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No. 88-1217

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In The

Supreme Court of the United States

October Term, 1988

CITY OF FORT LAUDERDALE, et. al.,

Petitioners,

v.

A. A. PROFILES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION OF THE CITY OF FORT LAUDERDALE, et. al., FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Petitioners' Statement of the Case is directed to the merits of this dispute and not the Jurisdiction of this Court. The following correctly sets forth the question at issue:

> SHOULD THIS COURT REVIEW BY CERTIORARI AN "ANCILLARY HOLDING" OF A FEDERAL APPELLATE COURT FOR THE PURPOSE OF CORRECTING "MISAPPREHENSIONS" OF STATE LAW?

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STATEMENT OF THE CASE

The present controversy began with A. A. Profiles' (Profiles) attempts to develop a twenty eight acre piece of property that had been zoned M-1, Fort Lauderdale's least restrictive industrial classification "since at least 1948."[1] Even though a residential area had developed to the point where it abutted portions of the parcel in question, the land was still designated "industrial" under both City and County land use plans when Profiles interest emerged in 1979.

Profiles planned to utilize the property as a site at which to operate a facility for the conversion of felled trees and other woody plant material into wood chips for use in landscaping and plywood manufacture. M-1 zoning allowed salvage yards, oil refineries and rendering plants. The ordinance establishing the M-1 classification, however, provided that where excessive dust or noise might be associated with a particular use, approval by the City's Fire and Health Departments, its Planning and Zoning Board, and, finally, by the City Commission were required. The Commission is Fort Lauderdale's governing body under the City's commission manager plan of government.

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1. The matters contained in this Statement of The Case are distilled from Fort Lauderdale City Attorney Communication Number 80-457, which is included in the Appendix to this brief, as well as from the opinions of the Eleventh Circuit and the findings and conclusions of the trial court. The rulings of both courts as well as the applicable zoning ordinances are included in the Appendix to the Petition.

Because the woodchipping operation was considered to be a use which could produce excessive dust or noise, Profiles was required to, and did, submit its development plans for review as required. When the Commission ultimately gave its approval, the woodchipping operation becane a legally permitted use. When Profiles relied on that approval, and did so the extent of several million dollars, the legally permitted use matured into a vested property right.

In late April of 1980, with land clearing practically completed and construction in progress, the City began receiving complaints about the nature of Profiles' activities. On May 6, 1980, those complaints found their way to the City Commission. Rather than simply enforce its public health regulations as the City Attorney advised, and despite an explicit warning from their own lawyer that the City could not constitutionally interfere with Profiles' now vested property rights, the Commission proceeded to do exactly what the CityAttorney said could not be done lawfully and "temporarily suspended" Profiles' development rights.

While Profiles was open to reasonable alternatives, the City would have none of it. The "temporary suspension" in the words of the Trial Judge, "in effect became permanent"[2] (Petitioners' Appendix, 21a). Eventually, the

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2. This case does not represent the only instance in which a Florida municipality has sought to stall a politically unpopular project into oblivion, *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987); *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 14, 15 (Fla. 1987). Such a course of

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City rezoned the property to a classification that the trial Judge found "wouldn't permit anything like a wood-chipping operation" (Petitioners' Appendix, 15a). Ultimately, Profiles became unable to meet its expenses. Foreclosure, and this lawsuit, resulted. Profiles' complaint, incidentally, contained an inverse condemnation count in addition to the request for relief under 42 U.S.C. 1983 (Petitioners' Appendix, 9a).

SUMMARY OF ARGUMENT

Petitioners request this Court review an "ancillary holding" of the Eleventh Circuit to rectify what is said to be a "misapprehension of Florida law." No reason is given why this Court should depart from the deference historically given determinations of state law made by the lower federal courts. Should there be a need to clarify Florida law, the particular issue should be presented to the Florida Supreme Court in an appropriate case.

Further, of the cases cited for direct conflict, only one even mentions Florida law. On the point addressed, that decision agrees with the conclusion of the Eleventh Circuit.

Lastly, this case is materially different on its facts from any of the decisions on which Petitioners rely.

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conduct has also been pursued as an attempt to insulate from challenge an otherwise illegal zoning change. *Hollywood Beach Hotel Co.*, 329 So.2d at 16. As is reflected in *Corn*, Florida municipalities fight such wars of attrition with astonishing persistence.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT CANNOT EFFECTIVELY RESOLVE A QUESTION OF STATE LAW

In *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct, 2561, 91 L.Ed.2d 285 (1986) and *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court addressed unresolved issues of national import. Once those cases had been decided however, the application of the principles announced to the facts of any particular case is a matter of far more restricted concern. Here, for example, the broadest significance even Petitioners attribute to what they characterize as the Eleventh Circuit's "misapprehension" is its "impact on state law."

Interpretations of state law by the federal courts are not binding on the state judiciary, *see, Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1987). Consequently, even were Petitioners correct in their assertion that an "ancillary holding" of the Court of Appeals represents a "misapprehension of Florida Law," the impact of that ruling on State law is questionable at best, and in any event, is a matter more appropriately left to the Supreme Court that sits in Tallahassee. Or, as this Court has phrased it:

> [A] challenge to state law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.

Haring v. Prosise, 462 U.S. 306, 314, n.8, 103 S.Ct. 2365, 2373, 76 L.Ed.2d 595 (1983).

There is little reason for this Court to review matters that can be resolved definitively only by the highest court of a State.

II. THE ELEVENTH CIRCUIT'S DECISION CORRECTLY APPLIES THE LAW AS ANNOUNCED BY THIS COURT AND IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUIT COURTS

This Court, in *MacDonald* and *Williamson County*, imposed a requirement of administrative finality on regulatory takings claims. While finality is the federal requirement, the procedure by which finality is attained is determined by state statute or even municipal ordinance. Similarly, and perhaps obviously, the question of whether state law affords a means by which compensation may be obtained when regulation "goes too far" is determined with reference to what local law allows.

In this case, the Court of Appeals concluded that, under the ordinances of the City of Fort Lauderdale in effect at the time, the evidence demonstrated that the local authorities had in fact arrived at a "final, definitive position."[3] Further, reiterating and elaborating upon the

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3. Petitioners' suggestion that Profiles was required to submit this dispute to either the Board of Rules and Appeals or the Board of Adjustment confuses finality with exhaustion. The procedure before either agency involves an appeal from an initial decision by an administrative official. An appeal, by definition, is not part of the initial decision making process. *Williamson County Planning Commission v. Hamilton Bank*, 473

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holding of a different panel of the court in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) the Eleventh Circuit, in this case, held that, in matters related to zoning, Florida law did not provide any means by which compensation could be obtained for losses inflicted by regulation gone too far.[4]

The decisions of the Ninth Circuit in *Austin v. City and County of Honolulu*, 840 F.2d 678 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 136 (1988); *Shelter Creek Development Corp. v. Oxnard*, 838 F.2d 375 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 136 (1988); *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987); and *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, amended 830 F.2d 968 (9th Cir. 1987) together with the decision of the Seventh Circuit in *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988) are simply illustrations of the same principles announced in *MacDonald* and *Williamson County* to various aspects of government regulation as practiced in Hawaii, California, and Illinois. What differences may

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U.S. 172, 193, 105 S.Ct. 3108, 3119, 3120, 87 L.Ed.2d 124, 126, 143 (1985). In any event, neither agency has the authority to either participate in, or pass upon, decisions of the City Commission in zoning matters.

4. In either *Corn* or this case, the two separate panels of the Eleventh Circuit, each of which included a Judge who is a member of the Florida Bar, reviewed all the avenues Petitioners suggest might be available to provide compensation in a regulatory takings case. The Court of Appeals concluded that Florida law provides no means by which compensation may be obtained in such cases. Petitioners suggest no basis upon which this Court should abandon the deference it historically has given to interpetations of state law made by the lower federal courts. *E.g., Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30, 66 S.Ct. 445, 451, 90 L.Ed. 358 (1946).

exist between those decisions and the conclusions of the Eleventh Circuit in this case reflect nothing more than variations in local regulatory practice.

Petitioners' statements claiming direct conflict notwithstanding, in only one of those decisions is Florida law so much as mentioned. In *Austin*, the Ninth Circuit cited *Corn* for the proposition that Florida law did not allow a damage remedy in regulatory takings cases and went on to distinguish the case before it on the basis that the question was still open under the controlling law of Hawaii, *Austin*, 840 F.2d at 681.

Consensus among the Circuit Courts on matters of federal concern is not a matter requiring this Court's attention.

III. THIS CASE IS DISTINGUISHABLE FROM OTHER REGULATORY TAKING CASES ON ITS FACTS

The facts also distinguish this case from decisions such as those cited by Petitioner. To the extent that the latter group of cases can be said to have any common denominator at all it is that the land owner filed suit *in media res*. The developer failed to follow the initial decision making procedure through to its conclusion prior to filing suit. Had Profiles balked at any of the numerous concessions the City demanded and filed suit while the approval of its project was pending, it would have found itself with no final decision.

Unlike the owners in those cases, Profiles persevered and ultimately won approval for its project from the City

Commission. With the passage of Resolution 79-440, Profiles proposed development became a legally permitted use. Under the City's M-1 zoning ordinance, the commission was the highest and final authority having power to determine whether or not a specified conditional use would be allowed within the exitsing zoning. Consequently, the enabling resolution cannot be described as anything but a "final definitive position" respecting the application of the City's M-1 zoning ordinance to the property Profiles was to acquire. The impression Petitioners Statement of The Case is written to convey notwithstanding, the process of legitimate administrative review was over five months before the incidents giving rise to this case even began.

Were that not enough, when the City did "temporarily suspend" Profiles development rights the result was a building moratorium indistinguishable in effect from that produced by the ordinance this Court considered in *First English Evangelical Lutheran Church of Glendale v. City and County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The "temporary suspension" was followed by a rezoning which, Petitioners argue, "had no application to Profiles." Thus, the actions of the City in this case would have effected a taking of Profiles property even had the final rezoning – the sole basis on which Petitioners quarrel with the decision of the Eleventh Circuit – never occurred. If everything Petitioners claim were true, the result in this case would be exactly the same.

CONCLUSION

Respondent respectfully requests that this Court reject the Petition for Writ of Certiorari.

Respectfully submitted,

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City Attorney Communication No. 80-457 (Exhibit 31).....App. 1

APPENDIX

TO: Mayor E. Clay Shaw, Jr.
Vice-Mayor Virginia S. Young
Commissioner Robert O. Cox
Commissioner Richard A. Mills, Jr.
Commissioner Bert Frazer

FROM: Donald R. Hall, City Attorney

DATE: May 2, 1980

RE: Profiles, Inc. Wood Chipping Operation

CITY ATTORNEY COMMUNICATION
#80-457

At the request of the City Manager I have reviewed the facts and circumstances surrounding the various approvals of the wood chipping operation proposed by Profiles, Inc. and the legal effect of Resolution No. 79-440 which authorized the establishment of the subject use on the M-1 zoned parcel of property located at Northwest 23rd Avenue and 19th Street. For the reasons outlined below, it is my opinion that the City of Fort Lauderdale may not now rescind Resolution No. 79-440 or refuse to issue the appropriate building permits to Profiles for the purpose of terminating that property owner's wood chipping operation.

The subject parcel of property has been zoned M-1, the City's least restrictive industrial and manufacturing zoning category, since at least 1948. This parcel of land is designated as "Industrial" by both the Broward County Land Use Plan and Fort Lauderdale's certified plan, "Land Use 2000". In addition to a variety of heavy industrial uses, property zoned M-1 may be used for "auto wrecking yards, salvage yards, junk dealers and other

types of businesses using open storage . . . " when such open storage areas are enclosed by a wall at least six feet six inches in height (Sec. 47-20.1(b) of the Code) without the necessity of securing the types of approvals that have been required of Profiles.

In this particular instance the Director of Building and Zoning determined that there was a possibility that the proposed wood chipping operation might be accompanied by an excessive level of noise or dust. Accordingly, pursuant to Section 47-20.2(j), this proposed use of the subject parcel was investigated by the Fire Department and the Broward County Health Department. In addition, a study of the noise levels to be generated by this proposed use was reviewed by both the City's Building and Zoning Department and the Broward County Environmental Quality Control Board. By the time this proposal reached the City's Planning and Zoning Board it had been reviewed and approved by agencies of state, county and city government. After a public hearing, the Planning and Zoning Board unanimously recommended that the City Commission adopt a Resolution approving the establishment of Profiles' wood chipping operation at the proposed site.

Based upon the recommendations of the several agencies described hereinabove and the Planning and Zoning Board, the City Commission adopted the aforementioned Resolution No. 79-440 at its meeting of December 4, 1979. At that point, the wood chipping operation for which Profiles had sought approval, became a legally permitted use of the subject property pursuant to Section 47-20.1(d) of the Code.

Having obtained the required governmental approvals, Profiles acquired the property and began the process of clearing the land and constructing the necessary walls and other structures required for the establishment of its wood chipping operation. We have been advised by its Attorney that Profiles has expended and incurred future financial obligations totalling approximately $3.9 million dollars in connection with this project, all in reliance upon both the existence of the M-1 zoning classification of the property and the above-mentioned governmental approvals.

In a long and uninterrupted line of decisions, Florida's Courts have held that where a property owner in good faith and in reliance upon an act of government (such as approval of a conditional use) has made a substantial change in position or has incurred extensive obligations, the government may not rescind its approval of, or refuse to issue building permits for, the approved use. In circumstances such as these, the property owner has acquired a vested right to proceed with the establishment of the approved use. (*Sakolsky v. City of Coral Gables*, 151 So. 2d 433 (Fla. 1963), *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So. 2d 10 (Fla. 1976)).

Accordingly, it is my opinion that, based upon the facts and legal authorities set forth hereinabove, Profiles has acquired a vested right to continue with its wood chipping operation so long as it complies with all applicable City ordinances. It is my further opinion that, based upon the U. S. Supreme Court's opinion in *Owen v. City of Independence*, announced April 16, 1980, should the City rescind Resolution No. 79-440 and, at this time and upon

these facts, prohibit the approved wood chipping operation, the City could conceivably find itself faced with a federal action in which it would enjoy no immunity from liability and consequently, no limitation on the amount of damages it could be required to pay should its defense in such an action be unsuccessful.

/s/ Donald R. Hall
City Attorney

DRH/DEL/mm

cc: R. E. Anderson, City Manager